Nos. 06-713, 06-730

IN THE

# Supreme Court of the United States

STATE OF WASHINGTON, *et al.*,
*Petitioners*,

v.

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

### INTEREST OF *AMICUS*

The Democratic National Committee ("DNC") is an unincorporated association that is the national political organization and governing body of the Democratic Party of the United States. The DNC invests considerable time, resources and effort in communicating to voters what the Party stands for and what it means to be a "Democrat." The DNC has a very significant interest, therefore, in what voters associate with the party label "Democrat" as it appears on the general election ballot next to the names of candidates.

The DNC actively supports Democratic candidates in federal, state and local elections throughout the nation. Re-

spondent Washington State Democratic Central Committee is the officially recognized state party body of the DNC in Washington State. The DNC has long supported the right of the national and state Democratic parties to limit participation in the selection of the parties' standard-bearers to Democratic voters.

The DNC's own rules governing the selection of delegates to its national presidential nominating convention have for more than two decades limited participation in the delegate selection process to Democratic voters only. Delegate Selection Rules for the 2008 Democratic National Convention, Rule 2(A). This Court upheld the DNC's constitutional right to implement that rule in the context of national convention delegate selection in *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

It is the position of the DNC that Washington's Initiative 872 unconstitutionally interferes with the ability of the Washington State Democratic Party to determine who will be allowed to participate in the selection of the party's standard-bearers, the individuals whom voters believe represent the party in the general election for various partisan offices. In addition, the Initiative 872 system impairs the functioning of the national Democratic Party by increasing the likelihood that candidates from Washington State running under, and elected under, the "Democratic" label will not represent the values, views and positions of the Democratic Party of the United States.

Pursuant to Sup. Ct. R. 37.3(a), written consent of all the parties to the filing of this brief has been lodged with the Clerk.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The "top-two" primary system of Initiative 872 affects the associational rights of the parties in exactly the same way as the blanket partisan primary addressed by the Court in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). First, a candidate on the general election ballot with "Democrat" next to his or her name *is* functionally the nominee of the Democratic Party because the party label will influence voters' decision-making in precisely the same way as when the candidate is formally the "nominee." Voters will simply act as if the candidate *is* the party's nominee.

Second, listing the candidate on the general election ballot with a party label has the same "forced association" effect as if the candidate were officially the party's nominee. The DNC not only devotes extensive resources to developing the "brand" of the Democratic Party—ensuring voters know what the party stands for—but takes pains to distance itself from candidates whose views are antithetical to the party's positions and values. Having a candidate not chosen by Democrats appear on the general election ballot as a "Democrat" undercuts the party's associational rights in the same way and to the same extent as if the party were forced to accept the candidate as its official nominee.

Finally, unless a candidate who bears a party label and appears on the general election ballot is treated as the party's nominee, the Initiative 872 system would create substantial uncertainty and confusion in the application of federal campaign finance rules to the parties.

## ARGUMENT

### I. THE INITIATIVE 872 SYSTEM AFFECTS THE ASSOCIATIONAL RIGHTS OF THE PARTIES IN THE SAME WAY AS A BLANKET PARTISAN PRIMARY

This Court has affirmed that, like all political parties, the "National Democratic Party and its adherents enjoy a constitutionally protected right of political association." *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 121 (1980) (quoting *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975)). The Court has further held that this freedom of association means, among other things, that a political party has a right "to select a 'standard bearer who best represents the party's ideologies and preferences.'" *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (quoting *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975) (Tamm, J., concurring)). A political party's right to choose its own standard-bearer includes the right to determine who will participate in that process, since limiting that right "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986).

In *Jones*, the Court held unconstitutional California's "blanket primary" system in which all voters, regardless of party affiliation, were given the opportunity to vote for any candidate regardless of party affiliation, and in which the winning candidate of each party would be advanced to the general election ballot. The Court ruled that by allowing voters of all parties to participate in selecting each party's nominee, the blanket primary violated the parties' freedom of association because it "forces political parties to associate with—to have their nominees, and hence their positions

determined by—those who, at best, have refused to affiliate with the party and, at worst, have expressly affiliated with a rival." *Jones*, 530 U.S. at 577.

In finding the state's asserted interests in promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy to be insufficiently compelling, the Court observed in dicta that these interests could be just as well advanced "by resorting to a *nonpartisan* blanket primary" in which each voter, "regardless of party affiliation, may then vote for any candidate, and the top two vote getters . . . then move on to the general election." *Id.* at 585 (emphasis in original). The Court noted that this "system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Id.* at 585-86.

In arguing that Washington Initiative 872 passes constitutional muster, Petitioners repeatedly insist that the "top-two" primary system of Initiative 872 is a "nonpartisan blanket primary" of the type arguably sanctioned by *Jones* and that in the Initiative 872 system, primary voters are *not* choosing any party's nominee. Brief of Petitioners State of Washington *et al.* ("State Br.") at 14, 37, 41; Brief of Petitioner Washington State Grange ("Grange Br.") at 31-34. Petitioners also point to the implementing regulations promulgated by the Secretary of State, which assert that "[v]oters at the primary election are not choosing a political party's nominees." Wash. Admin. Code 434-262-012 (2005), *cited in* Grange Br. at 32-33.

Simply calling the Initiative 872 top-two primary system "non-partisan," however, does not make it so. "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). The Initiative 872 system affects the associational rights of the parties in the same way as a partisan blanket primary precisely because (i) it advances to the general election ballot

candidates who will be regarded by voters in the same way as official party nominees and (ii) the "forced association" effect is exactly the same as if those candidates *were* the party's nominees.

### A. A Candidate On the General Election Ballot With a Party Label Next to Her Name is Functionally the Party's Nominee

The typical general election ballot lists candidates and identifies them by party label. It looks exactly like the general election ballot in the Initiative 872 system. The reality of the Initiative 872 system is that, at the option of any candidate, a party label appears next to that candidate in the primary election (Initiative 872, § 4) and—if that candidate is one of the two top vote-getters in the primary—that candidate appears on the general election ballot *with the same party label next to his or her name*. State Br. at 14, *citing* Initiative 872 § 7(3). Indeed, the Secretary of State's implementing regulations provided that any candidate who indicated party preference in the primary "*may not change* the party preference between the primary election and the general election." Wash. Admin. Code § 434-230-040 (2005) (emphasis added). Thus, if a candidate who runs in the primary as a Democrat is one of the top two vote-getters, and thus advances to the general election ballot, voters in the general election will see this on the ballot: "Jane Smith—Democrat." And, although Petitioners insist that parties remain free to "nominate" candidates through a separate, party-run process prior to the primary, *see* State Br. at 37, Grange Br. at 33-34, the fact that a candidate is the party's official nominee will not be, and cannot be, reflected on either the primary or general election ballot. J.A. 104-11 (Letters from County Auditors to John White); *see* Grange Br. at 23 (State of Washington not required to allow parties to put a statement on the ballot telling voters which person is the nominee).

Given what the voter actually sees when she looks at the ballot, the Initiative 872 system, in reality, functions as a partisan blanket primary and is being used to choose the party's standard-bearer. That is because the only significance of being a party's nominee, *insofar as the content of the ballot is concerned*, is that the candidate is listed on that ballot next to his or her party label.

The Court has recognized that, "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220. In fact, party labels do much more than merely "play a role." The mere inclusion of a party label—the mere visual juxtaposition of the party name and the candidate's name on the ballot—powerfully influences voter behavior. It does so by identifying the candidate, in the voter's mind, with everything that voter associates with the party in terms of platform, message, values and image.

"Voters with little information about individuals seeking office traditionally have relied upon party affiliation as a guide to choosing among candidates. . . . In local elections, a candidate's party affiliation may be the most salient information communicated to voters." *Branti v. Finkel*, 445 U.S. 507, 531 & n. 17 (1980) (Powell, J., dissenting) (citing Richard Murray & Arnold Vedlitz, *Party Voting in Lower-Level Electoral Contests*, 59 SOC. SCI. Q. 752, 756 (1979)). "Empirically, . . . scholars have repeatedly shown that party identification is a, even the, central component of voter decision making." Brian Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POLITICAL RESEARCH QTLY. 7, 9 (2001).

In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Court of Appeals for the Sixth Circuit struck down a state law

allowing major party candidates to have the party label next to their name but prohibiting nonparty candidates from having the label "Independent" appear next to their names. In finding this ban to be unacceptably burdensome and discriminatory, the Court of Appeals relied on expert testimony that "it does make a difference that some candidates have symbols after their names on the ballot while others do not. Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting." 970 F.2d at 172. The Court of Appeals further relied on expert evidence that "party candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth." *Id.* According to another expert relied upon in the case, a candidate's "use of a name and a label allowed *people to make a connection between the candidate and his platform and to create an identification in the voter's mind.*" *Id.* at 173 (emphasis added).

Despite the decline of straight-ticket voting in recent years, the party label next to the candidate's name is still extremely significant. "[M]any of the voters who are not splitting their tickets may rely upon little more than the "D" or "R" next to a candidate's name, and some of the ticket-splitters probably use the party voting cue for most races about which they have little information." Richard L. Hasen, *Point / Counterpoint: Do the Parties or the People Own the Electoral Process*, 149 U. PA. L. REV. 815, 824 (2001). Recent research confirms that the party label next to the candidate's name still strongly influences voter behavior and that the reason is the identification of the party with the candidate in the voter's mind. One study of the effect of ballot information on voters' decisions in judicial elections, for example, found that, "[s]imply providing respondents with the candidates' party affiliations had an enormous impact on their willingness to

choose a candidate and on the choice of one candidate over another. Not only do a great many voters come to the polls uncertain about what they will do in particular contests, but they are willing to choose a course of action at the last possible moment on the basis of one piece of information." David Klein & Laurence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POLITICAL RESEARCH QTLY. 709, 725 (2001).

The reason for this is that "[p]arty labels . . . provide important cognitive information. They convey generally accurate policy information about candidates . . . ." Schaffner, Streb & Wright, *supra*, 54 POLITICAL RESEARCH QTLY. at 9. As another study found, the party label influences voter behavior because of the identification, in the voter's mind, of the party label with a whole universe of assumed information about the party, *i.e.*, "partisan stereotypes" which are "rich cognitive categories containing not only policy information but group alliances, trait judgments, specific examples . . . and performance assessments . . . ." Wendy Rahn, *The Role of Partisan Stereotypes in Information Processing About Political Candidates*, 37 AM. J. OF POL. SCI. 472, 474 (1993). As a result, voters "neglect policy information in reaching evaluations; they use the [party] label rather than policy attributes in drawing inferences. . . . Based on this analysis, partisan stereotypes appear to be quite robust cognitive categories with considerable influence . . . ." *Id.* at 492.

Given these realities of voter perception and behavior, the Court of Appeals in this case was clearly correct in finding that, to the extent Initiative 872 "allows candidates to self-identify with a particular party—even if only as a 'preference'—it cloaks them with a powerful voting cue linked to that party." *Washington State Republican Party v. State of Washington*, 460 F.3d 1108, 1119 (9th Cir. 2006). And the voter will use that cue in exactly the same way as if the candidate were the official nominee of the party: the voter

will associate the party's platform, message, values and image with the candidate and respond accordingly.

In these circumstances, it matters little that the state statute purports to treat the party label as merely indicating the candidate's "personal preference." Contrary to the Grange's contention, Grange Br. at 25, it is perfectly reasonable to assume that Washington voters do *not* know the nuanced details of their election statutes. It is unrealistic to attribute to the voter sophisticated knowledge that the state statute deems the party label on the ballot to indicate only "personal preference," rather than indicating nomination by "membership" in or "affiliation" with the political party. State Br. at 23-24. From the perspective of voter perception and behavior, the candidate who appears labeled as a "Democrat" on the ballot will be treated, *by the voter*, as the nominee of the Democratic Party. The State asserts that it is "unlikely that voters will mistakenly consider a candidate's statement of party preference to be a statement that a candidate is the nominee of the party . . . ." State Br. at 24. Exactly the opposite is the case. It is almost a certainty that voters will perceive and act as if the candidate with a party label next to her name *is* the party's nominee.

### B. The "Forced Association" Effect Is the Same for a Candidate Appearing on the General Election Ballot With a Party Label as For a Nominee

The State argues that "[b]ecause Initiative 872 does not nominate the candidates of the parties, it does not create a forced association that caused the Court to strike down the blanket primary in *Jones*." State Br. at 43. The "forced association," however results simply and directly from the listing on the *general* election ballot, next to the party label of the name of a candidate who was not selected by members of that party. As discussed in Section I, *supra*, a general election

voter will automatically associate—with any candidate whose name appears on the general election ballot next to the party label—a whole host of information the voter knows (or thinks she knows) about the party. The association is automatic and unavoidable. The Court of Appeals correctly concluded, therefore, that, "[g]iven that the statement of party preference is the sole indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate." *Washington State Republican Party*, 460 F. 3d at 1119.

That "impression of associational ties" burdens the party's associational rights to precisely the same extent, and in the same way, as if that candidate had been selected, through the primary, as the official nominee of the party. The DNC expends great effort and resources to communicate to voters what the Party stands for, by means ranging from distributing door-hangers and cards through volunteer canvassers organized by its State Party Partnership Project staff and the state Democratic parties, to paid advertising, to press releases and statements sent virtually every day to thousands of media outlets and by e-mail to millions of DNC supporters and activists. The "brand" of the Democratic Party—in the sense of what values and positions voters associate with the Party—is of great importance to the DNC and to its state parties. It is detrimental to the Party's ability to organize for the advancement of its beliefs to be associated with candidates who have not been selected by Democratic voters and who do not share the Party's values and positions.

Indeed, the DNC has taken pains to ensure that it is *not* associated with candidates whose views and records are antithetical to the Democratic Party's values, views and positions. The DNC's rules for selection of delegates to the National Convention provide that, "[b]ased on the right of the

Democratic Party to freely assemble and to determine the criteria for its candidates, it is determined that all candidates for the Democratic nomination for President or Vice President shall . . . have demonstrated a commitment to the goals and objectives of the Democratic Party as determined by the National Chair . . . ." 2008 Delegate Selection Rules, Rule 12(K). A similar rule has been in effect since 1996.

In connection with the presidential nominating process that year, the DNC National Chair sent state parties a letter indicating that Lyndon LaRouche, who was then seeking the Democratic nomination for President, was, by virtue of his expressed racist and anti-Semitic views, not a bona fide Democrat under this rule; would not be eligible to have his name placed in nomination at the Convention; and would not be awarded any delegates. In a challenge brought by LaRouche asserting, among other things, that the DNC's actions violated his civil rights, the Court of Appeals emphasized that the DNC had its own constitutionally-protected right to decide with what candidates it wishes to be associated, finding that this Court's "cases have made clear that the very actions at issue here—the Party's decision about who can be nominated as delegates and even *about who can be considered a Democrat*—are themselves clothed in First Amendment protection." *LaRouche v. Fowler*, 152 F.3d 974, 992 (D.C. Cir. 1998) (emphasis added). The Court asked and answered the key question: "May a court require a political party . . . to show a compelling justification before it may limit a putative candidate's ability to associate itself with the party? . . . We already know the Supreme Court's likely answer to this question . . . ." *Id.* at 994.

To have a candidate's name appear on the general election ballot next to the label "Democrat" clearly associates that candidate in the minds of the voters in exactly the same way and to the same extent as if the candidate were the official nominee. As a practical matter, the imprimatur is the

same. And the association takes place even though the Party may not wish to be associated in any way with the candidate, and even though Democratic voters did not choose that candidate as their standard-bearer. The Court of Appeals, therefore, was correct in concluding that under Initiative 872, the "ballot communicates a political association that may be unreciprocated and misleading to the voters, to the detriment of the political parties and their bona fide members." *Washington State Republican Party*, 460 F.3d at 1121. In that regard, Initiative 872 has exactly the same "forced association" effect as if the primary did serve to select the official nominees of the Party.

## II. INITIATIVE 872'S CREATION OF A CATEGORY OF UNOFFICIAL NOMINEES IS A RECIPE FOR CONFUSION AND UNCERTAINTY IN THE APPLICATION OF FEDERAL CAMPAIGN FINANCE RULES APPLICABLE TO PARTIES

There are a variety of ways in which candidates become the nominees of political parties for particular offices under the various state laws. Parties may also have officially endorsed nominees in true non-partisan primaries, as the Court recognized in *Jones*. 530 U.S. at 585. Alone among the states, however, Washington has created a unique category of federal candidates whose names appear on the general election ballot under the party label but who are nonetheless deemed *not* to be the party's nominees, under state law. This system creates the potential for significant confusion in the administration of federal campaign finance laws applicable to political party committees.

First, under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 *et seq.* ("FECA"), a "political party" is defined as an "association, committee, or organization which nominates a candidate for Federal office *whose*

*name appears on the election ballot as the candidate* of such association, committee or organization." 2 U.S.C. §431(16) (2007) (emphasis added). In addition, the Act defines "national committee" as the "organization which, by virtue of the bylaws of a political party, is responsible for the day to day operation of such political party at the national level, as determined by the [Federal Election] Commission." 2 U.S.C. § 431(14) (2007). Under FECA, the consequences of being recognized as a national party committee are significant; among other things, a national political party can make expenditures in coordination with candidates for federal office far in excess of what any other political committee can contribute, monetarily or in-kind. 2 U.S.C. §441a(d); *see generally, Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 610-13 (1996) ("*Colorado Republican I*") (explaining special coordinated expenditure authority of recognized political parties).

In determining whether a party organization is the "national committee" of a political party, the Federal Election Commission (FEC) looks to determine whether the party has achieved ballot access for its candidates for federal office and specifically, whether it has achieved the "*nomination* of candidates for various Federal offices in numerous states," including offices beyond President and Vice President. FEC Advisory Opinion 1995-16 (July 14, 1995) (emphasis added) (finding that U.S. Taxpayers Party qualifies as national committee of a political party). *Accord*, FEC Advisory Opinion 1998-02 (March 6, 1998) (finding Reform Party USA to be national committee); FEC Advisory Opinion 2001-13 (Nov. 8, 2001) (finding Green Party USA to be national committee). Under Initiative 872, it will be impossible to determine whether a candidate who was not endorsed by a party but whose name appears on the general election ballot under the party label should be considered the "nominee" of the party, or not, for purposes of determining national committee status. If the answer is no, and if numerous other

states adopted a similar system, few new parties could ever qualify as national committees if their officially endorsed candidates—who cannot be identified as such on the primary ballot—were not advanced to the general election, even if another candidate running under the party label *did* appear on the general election ballot.

Second, under the coordinated expenditure provision itself, a national and state party may make expenditures, up to specified limits, "in connection with the general election campaign of a candidate for Federal office in a State who is *affiliated* with such party." 2 U.S.C. §441a(d)(3) (emphasis added). As explained by the Court in *Colorado Republican I*, the coordinated expenditure provision "creates a general exception from [the] contribution limitation" normally applicable to political committees—$5,000 per election to a federal candidate, 2 U.S.C. §441a(a)—and substitutes a much higher limit. 518 U.S. at 611. In 2006, for example, that limit was $39,600 for each of the national parties and the state parties, for expenditures made on behalf of a U.S. House candidate. FEC Record, March 2006 at 5. Under Initiative 872, a candidate who appears on the general election ballot next to a party label is specifically deemed to have indicated a preference, but not to be "affiliated" with the party. "Washington's law allows candidates to express their 'preferences' but takes no note of any candidate's 'party membership' or 'party affiliation.'" State Br. at 23. If a candidate advances to the general election ballot and her name appears next to the party label, is that candidate considered to be "affiliated" with the party? If so, the national and state party may make coordinated expenditures on behalf of the candidate. If not, they cannot. Initiative 872 thus leaves, in a completely confused and uncertain state, a national party's critically important legal authority to make coordinated expenditures on behalf of its federal candidates.

Third, FECA provides that state parties may spend their funds on certain defined volunteer, grassroots activities without having that spending count against either the contribution or coordinated expenditure limits. 2 U.S.C. §§431(9)(B)(iv), (viii) & (ix). Two of these exemptions are available for specified activities "on behalf of *nominees* of such party." 2 U.S.C. §§431(9)(B)(viii); 431(9)(B)(ix)(emphasis added). If under Initiative 872 a party does not separately endorse a candidate, but a candidate advances to the general election ballot under the party label, does the party have a "nominee" for purposes of this provision? Again, Initiative 872 would create significant confusion and uncertainty and though the FEC has authority to interpret and administer these provisions, there is no logical or obvious answer in such a system.

For these reasons, if the candidate appearing on the general election ballot with a party label under Initiative 872 is *not* deemed to be the party's nominee, the Initiative will create confusion in the implementation of federal campaign finance rules applicable to the party committees.

## CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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